No. 09-1143

Supreme Court, U.S.
FILED
JUL 2 - 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

LEE O. WILSON, JR.,

Petitioner,

v.

GENE M. JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

E. DUNCAN GETCHELL, JR.
State Solicitor General
dgetchell@oag.state.va.us
Counsel of Record

STEPHEN R. MCCULLOUGH
Senior Appellate Counsel
smccullough@oag.state.va.us

CHARLES E. JAMES, JR.
Chief Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for Respondents

July 2, 2010

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether an order initially denying the appointment of counsel in a civil case falls within the rare class of immediately appealable interlocutory orders.

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Virginia Attorney General Kenneth T. Cuccinelli, II on behalf of Gene M. Johnson, Director of the Virginia Department of Corrections, submits this Brief in Opposition to the Petition for Certiorari.[1]

INTRODUCTION

More than twenty years ago, a few circuits diverged from the remainder of the circuits on the issue of whether an order denying the appointment of counsel to a *pro se* litigant is immediately appealable. Three circuits hold that such an order is immediately appealable whereas the other circuits reject that view. Although such a split ordinarily might warrant this Court's review, several recent decisions from this Court make clear that this minority view is incorrect. None of these circuits have been asked to reconsider their holdings in light of this Court's recent cases. Given the likelihood that the split will resolve itself, there is no need for this Court to address the issue. Moreover, this case constitutes a poor vehicle to address the issue.

[1] On May 11, 2010, this Court extended the time for such filing to and including July 6, 2010.

STATEMENT OF THE CASE

1. Lee O. Wilson, Jr., while incarcerated in the Virginia Department of Corrections for a number of crimes, filed a complaint under 42 U.S.C. § 1983 alleging that the Virginia Department of Corrections had improperly detained him beyond the end of his sentence. Pet. App. 7a-8a. At the same time, Wilson sought habeas corpus relief in state court on the same basis. Pet. App. 9a n.2. Before the district court ruled on Wilson's § 1983 claim, the state circuit court held that the Virginia Department of Corrections correctly calculated Wilson's sentence and dismissed the petition. Pet. App. 9a n.2.

While his § 1983 case was still pending, Wilson was released from prison and then promptly re-incarcerated for a different crime. Pet. App. 9a. The district court, citing *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), dismissed the complaint *sua sponte*, without prejudice, on the basis that the petitioner must seek habeas relief rather than a civil action under § 1983. Pet. App. 7a.

Wilson appealed that determination to the United States Court of Appeals for the Fourth Circuit. A divided panel of that court reversed, holding *Heck* inapplicable because Wilson was seeking monetary damages for past incarceration, not release from present confinement. Pet. App. 18a. *Wilson v. Johnson*, 535 F.3d 262 (4th Cir. 2008).

2. Back in the district court, Wilson asked for a lawyer to be appointed. Pet. App. 3a. The district

court observed that while it may appoint counsel for *pro se* litigants under 28 U.S.C. § 1915(e)(1), the circumstances under which such an appointment is proper are limited. Under Fourth Circuit precedent, counsel may be appointed only if "exceptional circumstances" exist, such as when a case presents "particularly complex factual and legal issues" or when "a litigant . . . is unable to represent himself adequately." Pet. App. 4a (citing *Whisenant v. Yuam*, 739 F.2d 160, 163 (4th Cir. 1984)). The district court held that it was "unnecessary *at this time* to appoint counsel for plaintiff." Pet. App. 4a. The court reasoned that, no exceptional circumstances were present and, moreover, "to date, plaintiff has ably filed his pleadings and replied to the various orders as well as demonstrated comprehension of the procedures and laws of this Court and the Fourth Circuit Court of Appeals." Pet App. 4a. Wilson immediately appealed that order to the Fourth Circuit. That court dismissed the appeal, reasoning that it had no jurisdiction to entertain an appeal from such an interlocutory or collateral order. Pet. App. 2a.

REASONS FOR DENYING THE PETITION

Certiorari should be denied for two reasons. First, although there is a conflict among the Circuits on the question of whether an interlocutory appeal is permitted from an order refusing to appoint counsel, this split is simply an historical artifact that will likely resolve itself with the passage of time.

Moreover, this petition presents a poor vehicle for resolving the issue.

I. RECENT STATUTORY AND JURISPRUDENTIAL DEVELOPMENTS MAKE IT LIKELY THAT THE MINORITY CIRCUITS WILL REVISIT EARLIER HOLDINGS DECIDED BEFORE THESE CHANGES.

"Finality as a condition of review is an historic characteristic of federal appellate procedure." *Cobbledick v. United States*, 309 U.S. 323, 324 (1940). This longstanding policy is embodied in 28 U.S.C. § 1291, which limits the jurisdiction of the courts of appeals to appeals from "final decisions of the district courts." This Court has long given this statute a "practical rather than a technical construction," *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). Over time, through case adjudication, this Court developed a body of law specifying which types of orders fall within the "narrow" exception to the requirement of finality and which do not.

In 1990, Congress altered this dynamic by amending the Rules Enabling Act, 28 U.S.C. § 2071 *et seq.*, authorizing this Court to promulgate rules "defin[ing] when a ruling of a district court is final for the purposes of appeal under section 1291." 28 U.S.C. § 2072(c). The Court recognized the importance of this development in *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995), and again in *Mohawk Indus. v. Carpenter*, 130 S. Ct. 599 (2009). The Court

observed that the rulemaking procedure Congress established for determining which orders are appealable collateral orders "is not expansion by court decision, but by rulemaking under § 2072 . . . Congress' designation of the rulemaking process as the way to define or refine when a district court ruling is 'final' and when an interlocutory order is appealable warrants the Judiciary's full respect." *Swint*, 514 U.S. at 48. *See also Mohawk*, 130 S. Ct. at 609.

The petitioner correctly observes that three circuits have diverged from the strong majority of circuits that do not hear interlocutory appeals from orders denying the appointment of counsel.[2] All three decisions date from the same period some 20 or 25 years ago: *Lariscey v. United States*, 861 F.2d 1267 (Fed. Cir. 1988); *Robbins v. Maggio*, 750 F.2d 405 (5th Cir. 1985); *Slaughter v. City of Maplewood*, 731 F.2d 587 (8th Cir. 1984).[3] Each of these decisions was made

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[2] A strong majority of the circuits have concluded that an order declining to appoint counsel is not immediately appealable. *Appleby v. Meachum*, 696 F.2d 145 (1st Cir. 1983) (*per curiam*); *Miller v. Pleasure*, 425 F.2d 1205 (2nd Cir. 1970) (*per curiam*); *Smith-Bey v. Petsock*, 741 F.2d 22 (3rd Cir. 1984); *Miller v. Simmons*, 814 F.2d 962 (4th Cir. 1987); *Henry v. City of Detroit Manpower Dep't*, 763 F.2d 757 (6th Cir. 1985); *Randle v. Victor Welding Supply Co.*, 664 F.2d 1064, 1066-67 (7th Cir. 1981); *Cotner v. Mason*, 657 F.2d 1390, 1391-92 (10th Cir. 1981); *Holt v. Ford*, 862 F.2d 850, 853-54 (11th Cir. 1989); *Ficken v. Alvarez*, 146 F.3d 978 (D.C. Cir. 1998).

[3] The Ninth Circuit, in a fact-specific and divided panel decision also held that the appointment of counsel in a Title VII

(Continued on following page)

before the amendments to the Rules Enabling Act and this Court's decisions in *Swint* and *Mohawk*. When these courts are again presented with the issue, it is difficult to see how, in light of *Swint* and *Mohawk*, these circuits could resist revising their holdings. Thus, there is no need for this Court to intervene.

In addition, all three decisions are premised upon the notion that an order refusing to appoint counsel is effectively unreviewable on appeal because "the appellate court may never know whether a different or better case could have been presented that would have turned the tide in the indigent litigant's favor." *Lariscey*, 861 F.2d at 1270, or because the *pro se* litigant will be prejudiced throughout the trial. *See Slaughter*, 731 F.2d at 589; *Robbins*, 750 F.2d at 413.

After these decisions, in *Digital Equipment Corp. v. Desktop Direct Inc.*, 511 U.S. 863 (1994), this Court swept aside both of these rationales. This Court noted that

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case was immediately appealable. *Bradshaw v. Zoological Soc'y of San Diego*, 662 F.2d 1301 (9th Cir. 1981) (Reinhardt, J., writing for the court). The Ninth Circuit has since refused to extend the holding in *Bradshaw*, essentially limiting it to Title VII cases. *See Wilborn v. Escalderon*, 789 F.2d 1328, 1330 (9th Cir. 1986) (refusing to extend the collateral order doctrine to plaintiffs in § 1983 cases, and limiting *Bradshaw* to the Title VII context); *Weygandt v. Look*, 718 F.2d 952 (9th Cir. 1983) (refusal of district court to appoint counsel in habeas cases not immediately appealable).

> the strong bias of § 1291 against piecemeal appeals almost never operates without some cost. A fully litigated case can no more be untried than the law's proverbial bell can be unrung, and almost every pretrial or trial order might be called "effectively unreviewable" in the sense that relief from error can never extend to rewriting history . . . But if immediate appellate review were available every such time, Congress's final decision rule would end up a pretty puny one, and so the mere identification of some interest that would be "irretrievably lost" has never sufficed to meet the third *Cohen* requirement [that an order be effectively unreviewable on appeal from a final judgment].

Id. at 872.

Applying this logic to the present context, an order denying the appointment of counsel is not "effectively unreviewable." The D.C. Circuit expressly relied on *Digital Equipment* to conclude that orders denying the appointment of counsel are not "effectively unreviewable." *Ficken*, 146 F.3d at 981-82. *Digital Equipment* fatally undermines the holding of the Fifth, Eighth and Federal Circuits that a refusal to appoint counsel is effectively unreviewable.

These two developments—the authority Congress conferred on this Court to rely on the rulemaking power rather than litigation to determine which collateral orders are immediately appealable, and this Court's clarification of what constitutes an

"effectively unreviewable" order—renders the minority view decisions of the Eighth, Fifth and Federal Circuits untenable. Lower courts must, of course, consider this Court's jurisprudence in assessing the ongoing validity of their own caselaw. There is no need for this Court to intervene to resolve a split that should resolve itself.[4]

In fact, that is precisely what happened in two circuits. The Seventh and Third Circuits have, in light of subsequent decisions from this Court, overruled earlier decisions permitting an interlocutory appeal. *See Petsock*, 741 F.2d at 26 (overruling *Ray v. Robinson*, 640 F.2d 474 (3rd Cir. 1981) on the ground that it had been "effectively overruled by the Supreme Court"); *Randle*, 664 F.2d at 1066-67 (overruling *Jones v. WYFR Radio/RKO General*, 626 F.2d 576 (7th Cir. 1980) as incompatible with a later decision from this Court).

Finally, courts adhering to the majority view that such orders are not immediately appealable will not hesitate to order a new trial or to remand the case when a district court has abused its discretion in

[4] To be sure, two of these circuits have more recently adjudicated cases involving interlocutory appeals of orders refusing the appointment of counsel. *Sanchez v. Chapman*, No. 08-11082, 2009 WL 3731891 (5th Cir. Nov. 9, 2009); *Swackhamer v. Scott*, 276 Fed. Appx. 544 (8th Cir. 2008); *Medrano v. Thomas*, 99 Fed. Appx. 521 (5th Cir. 2004); *Lane v. Astrue*, 279 Fed. Appx. 421 (8th Cir. 2008). It does not appear that in any of those cases the government asked the court to address the ongoing viability of precedent in light of this Court's more recent caselaw.

refusing to appoint counsel. *See Hodge v. Police Officers*, 802 F.2d 58, 62 (2nd Cir. 1986) (finding that district court abused its discretion in refusing to appoint counsel and ordering a hearing, with counsel, to determine whether the absence of counsel prejudiced the petitioner); *Whisenant*, 739 F.2d at 163-64 (ordering a new trial for *pro se* litigant who should have been appointed counsel). Given the broad discretion vested in trial courts in determining whether counsel should be appointed, such reversals will, of course, be rare.[5] Nevertheless, the clear availability of relief, combined with the broad discretion afforded to trial courts in deciding whether counsel should be appointed, militate in favor of allowing the circuits that adhere to the minority view the opportunity to reconsider.

II. THE FACTS OF THIS CASE MAKE IT A POOR VEHICLE TO RESOLVE THE QUESTION PRESENTED.

The district court made it plain that it was declining to appoint counsel for the petitioner "at this time." Pet. App. 4a. The district court certainly did not foreclose the possibility that counsel might later be appointed. Moreover, in parallel state litigation, a circuit court in Virginia conclusively resolved the

[5] Courts employ a deferential abuse of discretion standard in reviewing orders declining to appoint counsel. *See, e.g., Maclin v. Freake*, 650 F.2d 885, 886 (7th Cir. 1980) *(per curiam)*; *Whisenant*, 739 F.2d at 163.

merits of the petitioner's underlying claim that he was incarcerated beyond his release date. Pet. App. 9a n.2. These specific circumstances make this case a poor vehicle to resolve the question presented. A dispute that might resolve itself at some future stage of the litigation, thus making the case moot, combined with a garden-variety attempt to relitigate an issue previously determined against a litigant, is hardly the sort of case that ordinarily receives this Court's attention.

CONCLUSION

For reasons stated above, the Petition for a Writ of Certiorari should be **DENIED**.

Respectfully submitted,

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

E. DUNCAN GETCHELL, JR.
State Solicitor General
dgetchell@oag.state.va.us
Counsel of Record

STEPHEN R. MCCULLOUGH
Senior Appellate Counsel
smccullough@oag.state.va.us

CHARLES E. JAMES, JR.
Chief Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for Respondents

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